

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 90-425-E - ORDER NO. 91-272
APRIL 18, 1991

IN RE: Generic Proceeding Concerning)
 the Confidentiality of) ORDER
 Coal Contracts)

The Public Service Commission of South Carolina ("the Commission") initiated this proceeding sua sponte by the publication of a Notice of Hearing dated June 20, 1990. The Notice expressly named as parties "all jurisdictional electric utilities" and provided for the participation of any other interested parties upon compliance with the Commission's Rules of Practice and Procedure. The Notice likewise advised all interested persons of the Commission's intention to conduct a hearing in this proceeding.¹ Within the context of this proceeding, it was the Commission's intention to examine its practice of providing for limitations on the disclosure of coal supply and rail transportation agreements to which jurisdictional electric utilities are parties. See, Order Nos. 90-177 (Feb. 22, 1990), 90-335 (March 28, 1990), and 90-655 (July 3, 1990), issued in Docket Nos. 89-6-E and 90-7-E.

1. The original hearing date established in the Notice was continued by a Notice of Rescheduling Hearing dated October 4, 1990.

Thereafter, pursuant to notice duly provided in accordance with applicable provisions of law and with the Commission's Rules and Regulations, a public hearing was held in the offices of the Commission on October 31, 1990. Adrian N. Wilson, Esquire, Robert W. Kaylor, Esquire, and William F. Austin, Esquire, represented Carolina Power & Light Company ("CP&L"); Larry W. Porter, Esquire, and Robert T. Bockman, Esquire, represented Duke Power Company ("Duke")²; Mr. Bockman likewise represented South Carolina Electric & Gas Company ("SCE&G"); H. Simmons Tate, Jr., Esquire, and Fred R. Birkholz, Esquire, represented CSX Transportation, Inc. ("CSXT")³; Nancy J. Vaughn, Esquire, represented Steven W. Hamm, Consumer Advocate for the State of South Carolina ("the Consumer Advocate"); and Sarena D. Burch, Staff Counsel, represented the Commission Staff.

During the hearing, SCE&G offered the testimony of George C. How, General Manager - Regulatory Affairs and Fuel Procurement. Duke offered the testimony of R. H. Hall, Jr., Manager, Fuel Purchases. CP&L offered the testimony of Larry L. Yarger, Manager - Fossil Fuel. CP&L, Duke, and SCE&G jointly offered the testimony of Frederick J. Murrell. The Consumer Advocate offered the testimony of Vince Joyce. The record also includes the testimony of S. Frank Smith, Executive Vice President of Coastal

2. Duke associated Mr. Bockman for the purpose of satisfaction of the requirements of S.C. Code Ann., R.103-804(5)(1)(b) (1976), as amended. (Tr. p. 4, lines 9-22).

3. CSXT was permitted to intervene pursuant to Order No. 90-1014 (October 22, 1990).

Coal Sales, Inc. ("Coastal"), and a formal statement of position presented by CSXT. The Docket file contains a statement submitted by Cyprus Coal Sales Corporation, a subsidiary of Cyprus Minerals.

The evidence and the positions of the parties in this proceeding present the issue of whether the Commission should continue its practice of providing for protected disclosure of the coal supply and rail transportation contracts under which jurisdictional electric utilities procure coal supplies and provide for their delivery to generating plants or whether the Commission should allow public disclosure of these contracts. Based upon its thorough consideration of the record and upon the reasons further discussed, the Commission determines that its existing practice should be modified to allow the Consumer Advocate access to the contracts for the limited purpose of furthering the consumers' interests at the proceeding at issue.

FINDINGS OF FACT

1. SCE&G, Duke, and CP&L, the three electric utilities subject to this Commission's jurisdiction, contend that the Commission's policy of permitting disclosure of coal contracts and railroad transportation contracts by requiring the execution of a confidentiality agreement should be continued. (Tr. p. 10, lines 15-20; p. 31, lines 8-9; p. 40, lines 1-5). Witness How, sponsored by SCE&G, introduced a confidentiality agreement which he thought would allow reasonable access to the coal supply and railroad transportation contracts and also protect the electric utility's interests. (Tr. p. 6, lines 15 - 22). This

confidentiality agreement provides that the requesting party may not make a copy of the contract document. Hearing Exhibit 1. Witness Yarger testified that his company, CP&L, allowed the contract documents to be reviewed at the utility's office. (Tr. p. 43, line 21 - p. 44, line 11).

2. Witnesses for the electric utilities testified that unlimited public disclosure of their coal supply and railroad transportation contracts would impair their ability to effectively negotiate and obtain the most favorable terms for fuel supplies. The witnesses explained that by reviewing executed coal and transportation contracts, potential coal and transportation suppliers would know the electric company's desired terms and market options and, thereby, would increase their bargaining position. These witnesses testified that by having knowledge of the details of previously executed contracts, the coal and railroad companies would be less inclined to give the electric companies favorable contract terms or to negotiate innovative or price aggressive contract terms. Witness Murrell testified that if the coal or transportation contractor had more information than the electric utility, the utility would likely pay more for coal and transportation than it would if the contractor did not have the information. (Tr. p. 10, line 24- p. 11, line 25; p. 12, line 10- p. 13, line 3; p. 32, lines 9-22; p. 40, lines 18-21; p. 61, lines 13-20; p. 62, line 25- p. 63, line 25).

3. Witnesses for the electric utilities testified that, on the other hand, if the contracts remained confidential, coal

suppliers and railroad companies would be less willing to push for favorable terms for themselves for fear of loosing the contract altogether. (Tr. p. 41, lines 15-18). They also explained that coal suppliers and railroad companies might be more willing to give electric companies more favorable rates if they are relatively confident that their other customers will not learn of the terms of their agreements. (Tr. p. 42, lines 20-25; p. 66, lines 22-26).

4. Witness Murrell testified that while it was unlikely that public disclosure of coal supply contracts would stop coal companies from doing business with South Carolina electric companies, it was unlikely that the coal contractors would make any significant contractual concessions to the jurisdictional utilities. (Tr. p. 66, lines 16-22). Witness How testified that if the contracts were subject to unprotected disclosure, "suppliers might well be reluctant to do business with [SCE&G]." (Tr. p. 13, lines 16-19).

5. Electric company witnesses testified that the coal suppliers prefer that their coal supply contracts with electric utilities remain confidential and that coal supply contracts contain confidentiality provisions. (Tr. p. 13, lines 4-9; p. 64, lines 13-15). These witnesses further testified that coal suppliers do not want disclosure of the terms of the coal supply contracts for fear that their other customers will demand the same contract terms. (Tr. p. 32, lines 22-25; p. 62, lines 5-9).

6. Witnesses for the electric utilities testified that public disclosure of the coal supply and transportation contracts would increase the cost of fuel for electric companies in this jurisdiction. (Tr. p. 65, lines 22-24; p. 68, lines 9-12; p. 71, lines 17-19). These witnesses testified that, ultimately, the consumer would pay higher rates. (Tr. p. 19, line 11- p. 21, line 5; p. 30; p. 41, lines 21-23; p. 43, lines 1-4, p. 45, lines 6-7). These witnesses testified that public disclosure of the contracts would be to the detriment of the ratepayers and that the costs of public disclosure outweigh its benefits. (Tr. p. 22, lines 8-10; p. 35, line 24-p. 36, line 2; p. 60, lines 17-21).

7. Witness Smith, Executive Vice President of Coastal Coal Sales, testified that coal supply contracts should remain confidential and not be subject to public disclosure. (Tr p. 89, lines 3-4).⁴ He testified that if public disclosure was permitted, he would be concerned that business concepts and proprietary information would be used by consultants or competitors to the detriment of both SCE&G and Coastal Coal Sales. (Tr. p. 90, lines 9-13). Witness Smith agreed that if the contracts were subject to public disclosure, his company would "[m]ost likely. . . not include innovative terms and conditions because of a fear that our competitors would duplicate our practices." (Tr. p. 90, lines 16-21). On cross-examination,

4. Coastal Coal Sales sells to SCE&G and Duke. (Tr. p. 92, lines 14-15).

Witness Smith testified that if he knew the contact price of another coal supplier, he would consider underbidding that company if the terms and conditions were suitable and would consider innovative terms if they were favorable to his company. (Tr. p. 97, lines 9-12; p. 102, lines 14-19).

8. CSXT briefly stated its position on the record. CSXT stated that it was opposed to the public disclosure of rail contracts because their confidentiality is authorized by the Staggers Rail Act of 1980. It also stated that Interstate Commerce Commission (ICC) filing regulations provide for confidentiality and that release of pricing information would tend to stabilize prices at higher levels. (Tr. p. 107, line 10-p. 109, line 5).

9. Witness Vince Joyce, sponsored by the Consumer Advocate, testified that coal supply and railroad transportation contracts should not be kept confidential but should be made available to the general public. (Tr. p. 121, lines 1-6). Witness Joyce explained that public disclosure is justified because most of the information in the contracts is already available to the public from other sources, that disclosure of the contracts will not harm the jurisdictional utilities or place them at a competitive disadvantage, and disclosure will not result in higher coal costs for consumers. (Tr. p. 121, lines 10- 19).

10. Specifically, Witness Joyce stated that all coal and transportation contracts are available for public disclosure in Kentucky and that the coal supply contracts of Consumers Power Company in Michigan are available for public review. (Tr. p. 123, line 11- p. 124, line 3; p. 126, lines 10- 23; p. 136, line 20 - p. 137, line 2). Joyce testified that the price of Consumers Power coal costs has not increased despite the contracts being made public and that because the coal contracts are public, the rates have actually been lowered. (Tr. p. 126, lines 16- 19; p. 140, lines 1-4). Witness Joyce testified that, in general, if contract information were made public, prices would be driven downward. (Tr. p. 141, lines 9 - 11).

11. Moreover, Witness Joyce testified that jurisdictional utilities would benefit from being able to review the coal contracts of potential coal suppliers. He further testified that coal suppliers would find it useful to review previous coal supply contracts of potential utility companies. (Tr. p. 125, line 12- p. 126, line 2). Witness Joyce stated that only "coal suppliers who are afraid of competition would want to keep contract information confidential." (Tr. p. 126, lines 2-4).

CONCLUSIONS OF LAW

After thoroughly considering the testimony presented at the hearing and its previous relevant Orders, the Commission rules as follows:

1. In order to protect the interests of both the South Carolina consumer and the jurisdictional electric utilities, the

Commission concludes that coal supply and railroad transportation agreements should continue to remain confidential, except as modified below.

2. Although it has considered the argument, the Commission is not convinced that public disclosure of the coal supply and transportation agreements of the jurisdictional utilities would not harm South Carolina's consumer. While disclosure of coal supply and railroad transportation agreements in Kentucky and disclosure of coal supply contracts by one electric company in Michigan may not have harmed and may actually have benefited the ratepayers in those states, the Commission is not convinced that the same result would occur if it permitted public disclosure of the contracts in South Carolina. The Commission asks the parties to continue to monitor and inform the Commission of the approaches other states take in regard to the regulation of coal supply and railroad transportation contracts. As more states remove the confidentiality of the contracts, the Commission may reassess the situation in this State.

3. Nonetheless, the Commission acknowledges that the Consumer Advocate is charged with the duty of protecting the interest of the consumer in the State of South Carolina. In protecting the consumer's interest, the Commission recognizes that the Consumer Advocate needs to review the coal supply and transportation agreements for particular proceedings before this Commission.

4. Therefore, when the Consumer Advocate deems it is in the interest of the consumer, the jurisdictional electric utilities shall provide copies of their coal supply and railroad transportation agreements to attorneys for the Consumer Advocate without the signing of confidentiality agreements. Attorneys for the Consumer Advocate shall hold the contracts in trust for the purpose of furthering the consumer's interest in the particular proceeding for which the contracts have been obtained. Attorneys for the Consumer Advocate may allow expert consultants to review the contracts but such consultants shall be subject to the same trust and terms as the Consumer Advocate. Accordingly, consultants may only use information contained in the contracts for the purpose of the proceeding at issue.

5. Any testimony concerning the coal supply and railroad transportation agreements should be filed under seal with the Commission. The Commission will then determine the propriety of the contractual information contained in the testimony. The burden of proof shall be on the party alleging confidentiality to show that such information should remain confidential.

6. All parties, other than the Consumer Advocate, shall be required to sign confidentiality agreements in order to review the electric utilities' coal supply and railroad transportation agreements.

7. The terms of this Order shall apply to those cases which address the issue of confidentiality and are presently on appeal.

8. Any violations of this Order shall be immediately

DOCKET NO. 90-425-E - ORDER NO. 91-272
APRIL 18, 1991
PAGE 11

reported to the Commission.

IT IS SO ORDERED.

BY ORDER OF THE COMMISSION:


Chairman

ATTEST:


Executive Director

(SEAL)